Supreme Court, U.S.
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NO. 95-336

In The
Supreme Court of The United States
October Term 1995

PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JOHN STEWART and VINCENT GRECO

Petitioners

vs.

CHARLES CHRISTY ,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, VINCENT GRECO, AND JOHN STEWART

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THIS CASE IS NOT CONTROLLED BY *JOHNSON V. JONES*, SINCE THE ISSUE IS NOT WHETHER THE PETITIONERS MADE AN EMPLOYMENT DECISION ADVERSE TO RESPONDENT, BUT WHETHER THEY COULD REASONABLY HAVE BELIEVED THEIR ACTIONS REGARDING THE DECISION WERE CONSISTENT WITH CLEARLY ESTABLISHED LAW

The Respondent has failed to address the entire thrust of qualified immunity asserted in the first Question Presented. Instead, Respondent claims that the qualified immunity issue in this case is controlled by *Johnson v. Jones*, 115 S. Ct. 2151 (1995), and that the Third Circuit rejected Petitioner's qualified immunity claim on that basis. This is clearly wrong.

In *Johnson* the plaintiff alleged that he was beaten by police, and the defendants asserted qualified immunity, claiming, in effect, "No, we were not the ones who beat you." *See id.* at 2153. This Court held that the defendants' denial was not a qualified immunity claim that could be immediately appealed under the collateral order doctrine.

In this case, the Respondent claims that the defendants failed to promote him for political reasons. The Petitioners are not claiming, "No, we were not the ones who failed to promote Christy," like the defense in *Johnson*. Instead, Petitioners are claiming, "Yes, we did fail to promote Christy, but those of us involved did it for proper legal reasons, not political reasons."

The Third Circuit recognized that the facts regarding the process that resulted in the failure to promote Christy were not in dispute, and summarized those facts in its opinion. *Christy v. Pennsylvania Turnpike Commission*, 54 F.3d 1140, 1143 (3d Cir. 1995) (App. 25a). The Third Circuit specifically rejected

Respondent's claim that it lacked a jurisdiction to consider the qualified immunity appeal under the collateral order doctrine:

> The plaintiff contends that we lack jurisdiction to entertain this argument because the District Court's decision was based on factual rather than legal grounds. We do not agree.

Id. at 1143 n.4 (App. 27a). The Third Circuit rejected Respondent's position on this issue, and no review of that rejection has been sought by Respondent. While Respondent fixes on the collateral order doctrine, he fails to even address the substance of the qualified immunity issue raised in the Petition. Respondent does not dispute that the second prong of qualified immunity as applied by this Court was ignored by the Third Circuit and the District Court below. Respondent does not dispute that the analysis of qualified immunity applied by the Court below is inconsistent with the analysis applied by this Court. Respondent does not dispute the deep division among the circuits as to the appropriate analysis for qualified immunity.

Meanwhile, qualified immunity is being applied at the circuit court level at a pace of almost a decision a day. Since the Petition was filed before this Court on August 25, 1995, 30 new opinions have been filed by circuit courts applying qualified immunity. *See Gunaca v. State of Texas*, ___ F.3d ___, 1995 WL 550519 (5th Cir. Oct. 3, 1995); *Seltzer-Bey v. Delo*, ___ F.3d ___, 1995 WL 574248 (8th Cir. Oct. 2, 1995); *Camp v. Gregory*, ___ F.3d ___, 1995 WL 576951 (7th Cir. Oct. 2, 1995); *Williamson v. Mills*, ___ F.3d ___, 1995 WL 539689 (11th Cir. Sept. 27, 1995); *Blissett v. Coughlin*, ___ F.3d ___, 1995 WL 566108 (2d Cir. Sept. 25, 1995); *Moore v. Valder*, ____ F.3d ___, 1995 WL 557406 (D.C. Cir., Sept. 22, 1995); *Vaughn v. U.S. Small Business Administration*, ___ F.3d

___, 1995 WL 555454 (6th Cir., Sept. 21, 1995); *Sindoni v. Young*, ___ F.3d ___, Unpublished Disposition, 1995 WL 555554 (4th Cir., Sept. 20, 1995); *Price v. Sasser*, ___ F.3d ___, 1995 WL 551271 (4th Cir., Sept. 19, 1995); *Barnette v. Folmar*, ___ F.3d ___, 1995 WL 514541 (11th Cir., Sept. 15, 1995); *Rodriguez v. Phillips*, ___ F.3d ___, 1995 WL 555564 (2d Cir., Sept. 13, 1995); *Duffie v. Edwards*, ___ F.3d ___, Unpublished Disposition, 1995 WL 542352 (4th Cir., Sept. 13, 1995); *Hervey v. Coral Estes*, ___ F.3d ___, 1995 WL 535026 (9th Cir., Sept. 12, 1995); *Buonocore v. Harris*, ___ F.3d ___, 1995 WL 536657 (4th Cir., Sept. 12, 1995); *Lennon v. Miller*, ___ F.3d ___, 1995 WL 540409 (9th Cir., Sept. 11, 1995); *Newell v. Sauser*, 1995 WL 530235 (9th Cir., Sept. 11, 1995); *Komlosi v. New York State Office of Mental Retardation and Developmental Disabilities*, ___ F.3d ___, 1995 WL 527830 (2d Cir., Sept. 7, 1995); *Willbanks v. Woodrow*, ___ F.3d ___, Unpublished Disposition, 1995 WL 519157 (10th Cir., Sept. 1, 1995); *Melek v. Kohler*, ___ F.3d ___, Unpublished Disposition, 1995 WL 520037 (9th Cir., Sept. 1, 1995); *Smith v. Myers*, ___ F.3d ___, Unpublished Disposition, 1995 WL 521158 (6th Cir. Sept. 1, 1995); *Colvin v. McDougall*, 62 F.3d 1316 (11th Cir. 1995); *White v. Harmon*, ___ F.3d ___, Unpublished Disposition, 1995 WL 518865 (6th Cir., Aug. 31, 1995); *Uhlrig v. Harder*, ___ F.3d ___, 1995 WL 510682 (10th Cir., Aug. 30, 1995); *Williams v. Bass*, ___ F.3d ___, 1995 WL 507309 (6th Cir., Aug. 29, 1995); *Alexander v. County of Los Angeles*, ___ F.3d ___, 1995 WL 507449 (9th Cir., Aug. 29, 1995); *Adams v. Poag*, 61 F.3d 1537 (11th Cir. 1995); *Neice v. Sawyer*, ___ F.3d ___, Unpublished Disposition, 1995 WL 510022 (6th Cir. Aug. 28, 1995); *Kincade v. City of Blue Springs, Missouri*, ___ F.2d ___, 1995 WL 502857 (8th Cir., Aug. 25, 1995); *Sizemore v. Aliff*, ___ F.3d ___, Unpublished Disposition, 1995 WL 502912 (4th Cir., Aug. 25, 1995); *Tamez v. City of San Marcos, Texas*, 62 F.3d 123 (5th Cir. 1995).

Circuit courts continue to resolve this issue using inconsistent tests, providing governmental officials with confusing and conflicting precedent and no clear consistent guidance as to what behavior will be protected by qualified immunity. This is an issue that cries out for clarification by this Court.

RESPONDENT HAS NOT ADDRESSED PETITIONERS' PRIMARY ELEVENTH AMENDMENT ARGUMENT, THAT THE CASE SHOULD BE REMANDED TO ALLOW THE PETITIONER TO CREATE A FACTUAL RECORD

Respondent's discussion of the second issue, concerning the reversible error in not remanding the issue of Eleventh Amendment immunity pursuant to *Hess v. Port Authority Trans-Hudson Corporation*, 115 S. Ct. 394 (1994), for development of a factual record, completely misses the petitioners' argument. This Court in the *Hess* case stressed the significance of the factual record developed in that case. *Id.* at 402-05. In this case, however, the record shows that neither the Respondent nor the Petitioners made any attempt to make a factual record on the issue of Eleventh Amendment immunity. Petitioner Pennsylvania Turnpike Commission asserted that it was entitled to Eleventh Amendment immunity as a matter of law in connection with making a Motion for Summary Judgment. Respondent never asserted that there were any genuine issues of material fact. Respondent's Brief fails to refute the Commission's primary argument, that the Commission, having moved for summary judgment, never had any reason to develop a factual record. Respondent's brief completely ignores this crucial fact, which warrants reversal and remand for development of a factual record.

CONCLUSION

For the reasons stated herein, and in the Petition for Writ of Certiorari, it is respectfully requested that certiorari be granted in this case.

Respectfully submitted,

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